TAKANG TIMBER SDN BHD

v.

SYARIKAT TINGAN LUMBER SDN BHD

HIGH COURT SABAH & SARAWAK, MIRI
SULAIMAN DAUD JC
[SUIT NO: 28 OF 1986]
22 SEPTEMBER 2001

CIVIL PROCEDURE: *Appeal - Competency of appeal - Appeal against ruling of deputy registrar - Whether ruling a judgment, order or decision - Whether deputy registrar's ruling a "decision" within the meaning of O. 56 r. 1(1), Rules of the High Court 1980 - Whether a "decision" as defined in s. 3 of the Courts of Judicature Act 1964 - Whether "decision" in O. 56 r. 1(1) Rules of the High Court 1980 has different intention as that defined in s. 3 Courts of Judicature Act 1964 - Interpretation Acts 1948 and 1967, s. 21(1)*

CIVIL PROCEDURE: *Appeal - Competency of appeal - Appeal against ruling of deputy registrar - Whether deputy registrar's ruling a "decision" as defined in s. 3 of the Courts of Judicature Act 1964 - Amendment to definition of "decision" - Whether intended to deprive defendant of its right to appeal under O. 56 r. 1(1) Rules of the High Court 1980 - Whether ruling of deputy registrar a decision for purpose of O. 56 r. 1(1) Rules of the High Court 1980 - Whether appealable*

This was an appeal by the defendant to the judge-in-chambers against the ruling of the deputy registrar ('DR') of the high court made in the course of proceedings for assessment of damages ('the said proceedings') in respect of the admissibility of certain documents marked as IDD4, IDD5 and IDD7 respectively. Learned counsel for the plaintiff raised a preliminary objection as to whether this appeal was competent in view of the meaning assigned to the word ''decision" under s. 3 of the Courts of Judicature Act 1964 ('the Act').

Counsel for the defendant contended that: (i) the appeal from the decision of the registrar is not an "appeal" in the true sense; (ii) a "decision" given at any stage of the proceedings is appealable under O. 56 of the Rules of the High Court ('RHC'); (iii) s. 3 of the Act should not be read into O. 56 of the RHC; (iv) that the interpretation of the word "decision" is otherwise required in the context of O. 56 RHC or that it is repugnant thereto and (v) the amendment to the definition of "decision" in s. 3 Courts of Judicature Act 1964 which came into force on 1 August 1998 could not have a retrospective effect to deprive the defendant of its existing right to appeal in respect of the present suit filed in 1986.

[1] The central issue was whether the ruling of the DR was a "decision" within the meaning of O. 56 r. 1(1) for it to be appealable to the judge-in-chambers notwithstanding that such appeal was not an appeal in the true sense. Even if the term "appeal" therein is construed as a ''rehearing", "revision" or whatsoever, the question still remains whether the ruling of the registrar in the present case was a judgment, order or decision in respect of which O. 56 of the RHC applies. The ruling of the DR on the admissibility of documentary evidence is not a judgment or order. It was also not a "decision" as defined in s. 3 of the Act. (pp. 645 h-i, 646a)

[2] The ruling of the DR in the present appeal was simply not a "decision" for O. 56 r. 1(1) of the RHC to apply. The ruling only relates to the admissibility of evidence for the determination of the parties' right in the proceedings for assessment of damages. (p 647a)

[3] The Interpretation Acts 1948 and 1967 (the Interpretation Acts) make provisions for the interpretation of written laws. In the case of the RHC it is a subsidiary legislation made under the Act. By virtue of s. 2(1)(e) of the Interpretation Acts s. 21(1) under Part I of the Interpretation Acts apply in the interpretation of the RHC. Upon perusal of O. 56 r. 1(1), nothing can be inferred therefrom that the word "decision" appearing therein has a different intention as that defined in s. 3 of the Act, or that the said definition is otherwise required in the context thereof. (p 647 b-e)

[4] The court could not find anything in the context or subject of O. 56 which made the application of s. 21 of the Interpretation Acts inconsistent with or repugnant to the said Order. (p 647f)

[5] The amendment to the definition of the word "decision" is not intended to deprive the defendant of its right of appeal under O. 56 r. 1(1). It merely seeks to provide for a new procedure when an appeal against a "decision" can be made. With the amendment an appeal shall lie from the ruling of the registrar to the judge-in-chambers if the ruling has finally disposed of the rights of the parties. Nothing therein can be construed as depriving the defendant of the right of appeal to which he is otherwise entitled if not for the amendment. Furthermore, as has been observed in the authorities earlier stated such an appeal is not in its true nature "an appeal" of the true sense. (p 648 a-b)

[6] The ruling of the DR on the admissibility of the documentary evidence IDD4, IDD5 and IDD7 was not a decision for the purpose of O. 56 r. 1(1) of the RHC which was appealable to the judge-in-chambers

thereunder. It was not a decision for the reason that such ruling does not finally dispose of the rights of the parties. The appeal was therefore incompetent. (p 648 e-f)

[Defendant's appeal dismissed with costs; plaintiff's preliminary objection upheld.]

Case(s) referred to:

Admi Ali & Anor v. Mohamad Isa Kadad [1987] 1 CLJ 445; [1987] CLJ (Rep) 37 ***(refd)***

BBMB Factoring Bhd v. Mariam Sasiman [2000] 3 CLJ 639 ***(refd)***

Co-operative Central Bank Ltd v. Choh Hong Kee [1999] 1 CLJ 890 ***(refd)***

Kee Yeh Maritime Co Ltd v. Coastal Shipping Sdn Bhd [2001] 5 CLJ 194 ***(refd)***

Lee Chow Meng v. PP [1978] 2 MLJ 36 ***(refd)***

Lim Phin Khian v. Kho Su Ming [1996] 1 CLJ 529 ***(refd)***

Ratnam v. Cumarasamy [1962] 28 MLJ 330 ***(refd)***

Seloga Jaya Sdn. Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 CLJ 716 ***(refd)***

Thong Guan Construction Sdn Bhd v. Shencourt Properties Sdn Bhd [2001] 5 CLJ 244 ***(refd)***

Tuan Hj Ahmad Abdul Rahman v. Arab Malaysia Finance Bhd [1996] 1 CLJ 241 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 3

Interpretation Acts 1948 and 1967, ss. 2(1)(e), 21(1)

Rules of the High Court 1980, O. 14, O. 37, O. 56 r. 1(1)

For the plaintiff - MS Sandhu; M/s MS Sandhu & Co

For the defendant - RR Sethu; Sapuan Spurwi; M/s Dominic Lai & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Sulaiman Daud JC:

This is an appeal by the defendant to the judge-in-chambers against the ruling of the learned Deputy Registrar ("DR") of the High Court made in the course of proceedings for assessment of damages ("the said proceedings") in respect of the admissibility of certain documents referred to therein. The said documents, comprising the re-amended statement of claim, the notes of proceedings and the judgment in respect of Miri High Court Suit No. MR. 26 of 1990, were referred to by the learned defendant's counsel during cross examination of witnesses in the said proceedings and marked as IDD4, IDD5 and IDD7 respectively. The ruling was made after submission by both parties following an objection by the learned plaintiff's counsel on the admissibility thereof.

However before the hearing of the appeal, Mr. Sandhu, the learned counsel for the plaintiff, upon prior written notice, raised a preliminary objection which give rise to the issue as to whether this appeal is competent in view of the meaning assigned to the word "decision" under s. 3 of the Courts of Judicature Act 1964 ("the Act").

The learned counsel contended that the ruling made by the learned DR on the admissibility of documents tendered in the hearing on assessment of damages is not a "decision" within the meaning of O. 56 r. 1(1) of the Rules of the High Court ("RHC"). The learned counsel argued that the proceedings before the learned DR is specifically for the assessment of damages under O. 37 of the RHC and the decision of the learned DR thereon is only appealable after the conclusion of the assessment and not before. He referred to the case of *Admi Ali & Anor v. Mohamad Isa Kadad* [1987] 1 CLJ 445; [1987] CLJ (Rep) 37 where it was held that in assessment of damages under O. 37 it is only when the damages has been assessed it becomes a final judgment.

The learned counsel further argued that the present appeal is against the ruling on the admissibility of documents which he contended to be a ruling on evidential matter and does not finally dispose of the right of the parties. In support of his argument the learned counsel referred to the case of *Ratnam v. Cumarasamy* [1962] 28 MLJ 330 where it is observed that the real test for determining whether an order is a final order is by asking the question whether such order finally dispose of the rights of the parties. In that case an order refusing an extension of time to file the record of appeal is held to be a final order as it put an end to the proceedings.

The other case cited by the learned plaintiff's counsel is *Kee Yeh Maritime Co Ltd v. Coastal Shipping Sdn Bhd* [2001] 5 CLJ 194 where it was held that the appeal against the ruling of the Session Court judge in dismissing the appellant's application to strike out the defence and granting the respondent leave to defend was incompetent as the order was only an interlocutory order and consequently not a decision defined by s. 3 of the Act.

Before I turn to consider the merit of the plaintiff's case and the submission of the learned defendant's counsel, I find it convenient at this stage to reproduce the statutory provisions relevant to the issue before this court. Order 56 r. 1(1) of the RHC provides for an appeal from decision of the registrar (which include the DR) to the judge-in-chambers as follows:

> (1) An appeal shall lie to a Judge-in-chambers from any judgment, order or decision of the Registrar.

The Courts of Judicature Act 1964 under which the RHC was enacted provide, in s. 3 thereof, for the interpretation of the word "decision" as follows:

> "decision" means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.

The aforesaid interpretation came into force on 1 August 1998.

Dato' R.R. Sethu, the learned defendant's counsel, contended that the learned DR's ruling on the admissibility of the documents is appealable to the judge-in-chambers notwithstanding the definition of the word "decision" in s. 3 of the Act. His argument which merit consideration can be summarised under five headings as follows, that is to say, firstly the appeal from the decision of the registrar is not an "appeal" in the true sense; secondly a "decision" given at any stage of the proceedings is appealable under O. 56 of the RHC; thirdly s. 3 of the Act should not be read into O. 56 of the RHC; fourthly that the interpretation of the word "decision" is otherwise required in the context of O. 56 of the RHC or that it is repugnant thereto; fifth that the defendant cannot be deprived of his existing right of appeal conferred under the law in force at the time of the institution of the suit in 1986.

With regard to the first point raised, it is not disputed that an appeal from the decision of the learned DR to the judge-in-chambers is not in its true nature "an appeal" in the true sense. An appeal in the true sense is a process by which the decision of one court is reviewed for correctness by a higher court in the judicial hierarchy (see *BBMB Factoring Bhd v. Mariam Sasiman* [2000] 3 CLJ 639). In an appeal against the decision of the learned DR the judge is not exercising an appellate jurisdiction in the same sense as when he hears appeals from judgments, decisions or order of the subordinate court (see *Tuan Hj Ahmad Abdul Rahman v. Arab Malaysia Finance Bhd* [1996] 1 CLJ 241). He only exercises his own discretion as if the matter comes before him for the first time (see *Seloga Jaya Sdn. Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 CLJ 716, *Thong Guan Construction Sdn Bhd v. Shencourt Properties Sdn Bhd* [2001] 5 CLJ 244).

With respect I am of the view that the authorities cited by the learned counsel which relate to the position or nature of an appeal from the decision of the learned DR to the judge-in-chambers is not relevant to the point in issues as raised in the preliminary objection. Here we are not concerned on the nature of such appeal or the jurisdiction of the judge-in-chambers in the hearing thereof. The central issue is whether the ruling of the learned DR is a "decision" within the meaning of O. 56 r. 1(1) for it to be appealable to the judge-in-chambers notwithstanding that such appeal is not an appeal in the true sense. Even if the term "appeal" therein is construed as a "rehearing", "revision" or whatsoever, the question still remains whether the ruling of the

learned registrar in the present case is a judgment, order or decision in respect of which O. 56 of the RHC applies. It is clear to me that the ruling of the learned DR on the admissibility of documentary evidence is not a judgment or order. It is also not a "decision" as defined in s. 3 of the Act.

Next I turn to the learned counsel's second contention that an appeal under O. 56 of the RHC can be made at any stage of the proceedings. In support of the proposition the learned counsel cited the case of *Co-operative Central Bank Ltd v. Choh Hong Kee* [1999] 1 CLJ 890 and *Thong Guan Construction Sdn Bhd v. Shencourt Properties Sdn Bhd* referred to earlier.

In *Co-operative Central Bank Ltd v. Choh Hong Kee* the first defendant, in an O. 14 application, appealed against the decision of the registrar in refusing to accept his affidavit in reply which was filed out of the prescribed time. The application was made orally at the hearing of the O. 14 application. At the hearing of the appeal the plaintiff raised a preliminary objection contending that the matter was not appealable under O. 56 of the RHC. It was held that by virtue of the definition of the word "proceedings" in s. 3 of the Act (which includes an application at any stage of the proceedings) the oral application of the first defendant to have the affidavit in question accepted in the O. 14 proceedings was clearly an application at a particular stage of the proceedings. The judgment, decision or order made by the registrar in that stage of the proceedings become clearly appealable under O. 56 of the RHC.

In *Thong Guan Construction Sdn Bhd v. Shencourt Properties Sdn Bhd* the defendant appealed to the judge-in-chambers against a decision of the Senior Assistant Registrar (SAR) allowing the plaintiff's application to amend the statement of claim. Before the appeal was heard, the plaintiff raised a preliminary objection contending that the SAR's decision was not appealable on the ground that the decision was an interlocutory order and therefore not a "decision" within the meaning of s. 3 of the Act. It was held that since the decision of the SAR is specifically made appealable under O. 56 r. 1(1) of the RHC to the judge-in-chambers, the new definition of "decision" in s. 3 of the Act does not apply to the SAR's decision for the purpose of O. 56 r. 1(1) of the RHC.

In my view the fact of the two cases cited above can be distinguished with that of the present appeal. In each of the cases aforesaid there was an application made at a stage for the proceedings, that is to say an application to admit an affidavit filed out of time and an application to amend the statement of claim. In my view the decision of the SAR in both cases finally dispose of the right of the parties in respect of the amended and the admission of the affidavit, as the case may be. Whereas in the present case the ruling of the learned DR on the admissibility of the documentary exhibits will not have the effect of finally disposing of the right of the parties.

It is plain and obvious that any decision of the DR is appealable to the judge-in-chambers under O. 56 r. 1(1). However as rightly pointed out by the learned plaintiff's counsel the ruling of the learned DR in the present appeal is simply not a "decision" for O. 56 r. 1(1) of the RHC to apply. The ruling only relates to the admissibility of evidence for the determination of the parties' right in the proceedings for assessment of damages.

The learned defendant's counsel's next contention is that s. 3 of the Act by its terms only applies to the provisions of the Act by virtue of the reference to the expression "In this Act ..." therein. He further contended that the word "decision" in O. 56 r. 1(1) cannot be given the interpretation as appearing in s. 3 of the Act as it is not consistent with the context of the said order. With respect I cannot accept such contention. The Interpretation Acts 1948 and 1967 ("the Interpretation Acts") make provisions for the interpretation of written laws. In the case of the RHC it is a subsidiary legislation made under Courts of Judicature Act 1964 (Revised 1972). By virtue of s. 2(1)(e) of the Interpretation Acts, in my view, Part I of the said Acts apply in the interpretation of the RHC. Section 21(1) under Part I of the Interpretation Acts, in so far as relevant, provides as follows:

> (1) Terms and expressions used in subsidiary legislation have the same meaning as in the written law under which the subsidiary legislation was made.

Upon perusal of the said O. 56 r. 1(1), nothing can be inferred therefrom that the word "decision" appearing therein has a different intention as that defined in s. 3 of the Act, or that the said definition is otherwise required in the context thereof. I also cannot find anything in the context or subject of O. 56 which made the application of the said s. 21 inconsistent with or repugnant to the said Order.

Now I turn to the last remaining issue raised by the learned defendant's counsel that the amendment to the definition of the word "decision" which came into force on 1 August 1998 cannot have a retrospective effect to deprive the defendant of its right to appeal in respect of the present suit filed in 1986.

In support of the proposition the court was referred to the case of *Lim Phin Khian v. Kho Su Ming* [1996] 1 CLJ 529 where it was held, following the *Macnaghten* case, that a right of appeal vests in a litigant at the time of the institution of the original proceedings. In other words, the point of time at which it is to be determined whether a right of appeal exists is the date on which the original action was instituted. The other case referred to is *Lee Chow Meng v. PP* [1978] 2 MLJ 36 where it was held that a statute that allows a person to appeal to superior court is not merely dealing with a matter of procedure but with rights.

In my view the said amendment to the definition of the word "decision" is not intended to deprive the defendant of its right of appeal under O. 56 r. 1(1). It merely seeks to provide for a new procedure when an appeal against a "decision" can be made. With the amendment an appeal shall lie from the ruling of the Registrar to the judge-in-chambers if the ruling has finally dispose of the rights of the parties. Nothing therein can be construed as depriving the defendant of the right of appeal to which he is otherwise entitled if not for the amendment. Furthermore as has been observed in the authorities earlier stated such an appeal is not in its true nature "an appeal" of the true sense. It is not, strictly speaking, an appeal in the sense that the decision is reviewed for correctness by a higher court in the judicial hierarchy.

With regard to the observation made by the learned defendant's counsel on the decision of his lordship Richard Malanjum J in *Kee Yeh Maritime Co Ltd v. Coastal Shipping Sdn Bhd*, I find it unnecessary to deliberate further on the said judgment as my finding is not based on the principle laid down in that case. It is also clear that the fact of that case can be distinguished from that of the present case. Furthermore unlike the present case that case is concerned with an appeal from the lower court to a higher court in the judicial hierarchy in respect of an interlocutory order made by the lower court. No such order was made in the present appeal.

For all the reason aforesaid I have come to the conclusion that the ruling of the learned DR on the admissibility of the documentary evidence IDD4, IDD5 and IDD7 is not a decision for the purpose of O. 56 r. 1(1) of the RHC which is appealable to the judge-in-chambers thereunder. It is not a decision for the reason that such ruling does not finally dispose of the rights of the parties. The appeal is therefore incompetent.

In the circumstances I uphold the learned plaintiff's counsel preliminary objection and dismissed this appeal with costs.